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Saturday, March 01, 2008

Comments on the United States Constitution (i)

This is the first of a series of comments on the United States Constitution, with some riffs thrown in about U.S. history generally.

We start on the eve of the American Revolution. England had colonized a wide variety of places on the globe under three general models: proprietary, corporate, and royal. All three occured on the East Coast of North America in the original thirteen colonies that became the United States.

Royal colonies were technically part of the royal administrative hierarchy, but they were the least common type. The most common type was the corporate. Corporations ranged from Church organizations (like abbeys) to municipalities ("boroughs") to, most important for our purposes, the colonial corporations. The East India Company, one of the first joint stock companies, is the most famous and powerful example of a colonial corporation, but most other English colonies and a number of the American colonies were also granted in this form. Proprietary colonies were modelled after Counties Palatine: counties that were, except for a handful of narrow "extraordinary writs", immune from the jurisdiction of King and Parliament.

Unlike modern economic corporations, both corporate and proprietary colonies were granted political property rights. These are rights to exercise coercive police powers: to collect taxes, to make and enforce certain kinds of laws. Traditional political property rights, called franchises, were narrow grants to exercise very particular kinds of police powers. The grants to colonial corporations were often much broader and vaguer, granting rights of "government" or "internal police" while reserving "the rights of Englishmen" to colonists. Furthermore, the distance of their operation from the Crown and Parliament, and absentee colonial governors often lent colonists a free hand in governing, which they tended to do through legislatures elected by owners of real property. Although under long English legal precedent corporate charters, and especially charterted political powers, are to be interpreted narrowly, the broad wording of many of the colonial charters made this hard to do.

Some colonies (such as Virginia and the Carolinas) lost their corporate or proprietary status through *quo warranto* forfeiture proceedings and became royal colonies. Others through *quo warranto* had their charters reissued in new forms. In both cases, governors usually came to be appointed by the Crown and local legislatures gained broad powers of lawmaking on the subject of the "internal police." But, as long as the charters were considered political property rights, no entity was sovereign -- neither the Crown, nor Parliament, nor the legislatures could exercise political power at will, but had to respect the political property rights; i.e. had to operate according to the colonial charter.

The Romanist worldview is an ancient and pernicious one, and its reassertion in the 18th century in English politics led among many

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other things to the American Revolution. The Romanist view dates back to the Roman Empire, and came to the modern world via the Code of the Empereror Justinian. This Code was revived in the West by the new law schools (later universities) of the 12th century and became the standard law taught at Continental medieval universities. England's universities, by contrast, did not teach the standard English law (common law) until the middle of the 18th century. Instead, the standard English legal education occurred at the Inns of Court, and taught a legal and political structure radically different to Justinian's, one unintelligible to the typical university legal scholar or political philosopher. Even though real law by that time differed widely from the Justinian Code, the Code has exerted an influence that slowly caused, first Continental, and then worldwide, political philosophy and then law to coverge on its model. The Napoleonic Code and most other modern European codes are modelled after Justinian's.

From the Justinian Code we get two totalitarian superstitions: first, that there must be a locus of power, a "sovereign", somewhere in any political system. In Justinian's Empire, this locus was the emperor himself, whose word was law. From this philosophy came the view of the sovereign king or dictator espoused by Bodin and Hobbes. In this model the king is the "head" and the rest of the "body politic" is controlled by the king, just as our brains control our bodies. Under Rosseau and Bentham, this locus was switched to "the people" or to, in practice, a parliament that supposedly represented "the people." Under the extreme sovereigntist view, separation of powers, federalism, and political property rights are all an illusion -- all power is just a revocable delegation from a supreme locus of sovereignty.

Actual English law and political structure were very different. Under this law, royal power was actually divided among the King, the King's counselors, Parliament, and justices. None of these entities was the "locus" of power but all played crucial roles. Furthermore, much of this power had been granted to other entities -- nobles, lords proprietor, municipal and colonial and church corporations, guilds, and so on -- in the form of largely irrevocable political property rights. Under the sovereigntist view, taught in universities, all such property grants were merely revocable delegations. But under the actual common law, taught to the actual lawyers and judges of the time in the Inns of Court (institutions completely independent of universities, and thus largely uninfected by Roman Law), these delegations were property rights forfeitable back to the grantor -- and the original grantor was the Crown -- only under extreme breach of grant conditions under a *quo warranto* proceeding.

The substantive law of Justinian's Code is quite valuable, containing a purely economic view of property championed by, among others, Adam Smith, and giving rise to our efficient modern capitalist economies. But its procedural law is utterly totalitarian and helped give rise, first to the totalitarian Kings and Czars, then to Napoleon, and then to the communist and fascist dictators of the 20th century. The English legal world largely avoided this fate, but the freedoms of its peoples have been undermined by its own creeping Romanism in the form of legislative sovereignty. The political philosophies and "political science" of universities have always been dominated by the sovereigntist paradigm, which pits sovereign government versus "anarchy" as our only political alternatives. When the Inns of Court gave way to universities in teaching English law, English legal philosophy and political structure too became increasingly Romanist.

Of the legal claims made by the American Revolutionists, the strongest and most credible was their argument that the novel assertions of parliamentary sovereignty under Lord North violated the colonial charters. But by that time American colonists, too, were under the spell of Rosseau's doctrine of legislative sovereignty. Samuel Adams reported on the eve of the Revolution, trying to square the circle, that is to reconcile the supposed "supreme power" (sovereignty) of Parliament with the political property rights granted by the charters:

> [Governor Hutchinson arguing on behalf of Parliament] although ... there must be one supreme authority [Parliament] ... , this constitution [Massachusett's colonial charter] will admit of subordinate powers, with legislative and executive authority, greater or less, according to local and other circumstances." "This is very true," the council [per Samuel Adams] replied, "and implies that the legislative and executive authority granted to the subordinate powers, should extend and operate, as far as the grant allows; and that, if it does not exceed the limits prescribed to it, and no forfeiture be incurred, the supreme power has no rightful authority to take away or diminish it, or to substitute its own acts, in cases wherein the acts of the subordinate power can, according to its constitution, operate. To suppose the contrary, is to

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> suppose, that it has no property in the privileges granted to it; for, *if it holds them at the will of the supreme power, ... it can have no property in them....* But, as in fact, the two powers are not incompatible, and do subsist together, each restraining its acts to their constitutional objects, can we not from hence, see how the supreme power may supervise, regulate, and make general laws for the kingdom, without interfering with the privileges of the subordinate powers within it? [emphasis added]

Since the sovereignty of Parliament was unacceptable to the colonists ("no taxation without representation"), and centuries of Romanist propaganda had by then extinguished almost all knowledge and recognition of political property rights beyond the Inns of Court, distribution of powers survived in the United States in only two forms: federalism (the nesting of larger and smaller territories, each with separate jurisdictions) and separation of powers (per Montisque, the separation between executive, judicial, and legislative powers). "Sovereignty" still had to be located somewhere. At first, during the Articles of Confederation period, colonies were dubbed "States" and declared by many to be sovereign. But even under the Articles of Confederation this was a fiction -- the Congress, not the States, sent diplomats abroad, and the "States" had delegated military authority to a confederate army led General Washington. As we shall see, the United States Constitution would render any talk of state sovereignty completely a matter of fiction, and it rivalled another fiction that would dominate in the long run -- that it was not any real entity, but a romantic fiction called "The People" that were sovereign. Using this fiction, the nature of the United States Constitution as a fictional grant of political property rights can be elucidated. Here is the preface to the Constitution, not legally binding, but illuminating of its nature:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Constitution proceeds to list a number of legally binding Articles, just as in a corporate charter. "We the People" was in fact a small cabal of delegates sent from state legislatures, who had only authority to amend the Articles of Confederation, not to unilaterally rewrite the rules under which said Articles could be amended such that they effectively scrapped them and started over. But with concepts like "We the People" blazing across the mental sky, who needs legal propriety?

Nevertheless, this nice fiction allowed the United States to avoid creating a real locus of sovereignty by creating a fictional sovereignty to satisfy the Romanists. Sovereignty, under this doctrine, is vested in "We The People." Some of this political power is granted, charter-like, to the United States federal government. The rest is granted (per the 10th Amendment) "to the States, or to the people, respectively" -- that is to each State and to individuals. In reality, political power is distributed amongst the federal government, states, counties, and munipalities, with a variety of enumerated and unenumerated rights that these governments may not infringe being retained by private persons. Meanwhile, though, political property rights, which had been central to the colonial charters on which the United States Constitution was modelled, had been forgotten here, and indeed in England outside of the Inns of Court and the now-obscure passage on franchises in Blackstone's *Commentaries*. The three main safeguards against totalitarianism in the United States would be federalism, separation of powers, and the Bill of Rights.

Posted by Nick Szabo at 1:02 PM

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3 comments:

Byrne said...

It's quite interesting that 'the people' as a sovereign unit started out as a fiction and gradually became more of a fact. The founders who talked about the people would be aghast (or at least embarrassed) at the kind of populism we have today.

9:16 PM

nick said...

Byrne, that's a great point. "We the People" is still rather fictional, though. Voters know so little about what they are voting for, and even representatives know so little about what they are voting for, that most power has, ironically, been delegated to unelected bureaucrats. Most federal lawmaking doesn't take place in Congress, it takes place in agencies. Even Congressional legislation, which is far fewer "lines of code" than agency regulation, is drafted primarily by corporate lobbyists and government bureaucrats, not by the representatives themselves. Most dispute adjudication takes place in agencies, not in federal courts. Appeals can be made to federal courts, but in disputes over the obscure effects of obscure chemicals on the human body, or in any number of other disputes in the obscure specialties of modern regulation, federal courts usually end up deferring to the expertise and biases of the agency. The main bias of the agency is to aggrandize its power, but this is very hard for courts to counter since they have to defer to the expertise. Nor, for the most part, do the courts want to counter it: a more powerful and intrusive federal government means more disputes, and more disputes mean more powerful courts.

In our statutory and regulatory lawmaking, only the lobbies of government employee unions and corporations get a substantial voice, either in the mass media or in the meeting rooms of the agencies where most laws are made. Voters only get to choose between broad political philosophies based on competing bureaucratic and corporate factions. Each bureaucratic faction wants to increase its own governmental powers, and only secondarily wants to tear down the power of the other faction. A faction sells itself to the voters primarily on the latter and performs primarily the former. Moldbug has covered this well, even if with rather too much verbosity and poetry. So "We the People" is still a fiction, but a far different kind of fiction than the Founders envisioned.

1:12 PM

Anonymous said...

I'm wondering if you could give me your opinion on something? I've been following your work and it's exceptional, but particularly your August, 2007 piece on quo warranto.

I'm sure you're aware of the recent DC code which states:

§ 16-3521. Persons against whom issued; civil action.

A quo warranto may be issued from the Superior Court of the District of Columbia in the name of the District of Columbia against -

(1) a person who within the District of Columbia usurps, intrudes into, or unlawfully holds or exercises, a franchise conferred by the District of Columbia, a public office of the District of Columbia, civil or military, or an office in a domestic corporation; or

(2) one or more persons who act as a corporation within the District of Columbia without being duly authorized, or exercise within the District of Columbia corporate rights, privileges, or franchises not granted them by law in force in the District of Columbia.

The proceedings shall be deemed a civil action.

Source: http://www.michie.com/dc/lpext.dll/dccode/7978/8058/8904/8917/8919?f=templates&fn=document-frame.htm&2.0

Now if quo warranto actions are arising from the state level on multiple grounds such as mandamus prior to an amended complaint, wouldn't the states still have the right to proceed if the relief they are seeking resides at the federal level? If so, why do we need this code? Is it merely a shortcut? There is also the criminal end of quo warranto that is not a civil action, which this code doesn't seem to even take into account.

You were dead on in your previous article that they certainly are doing anything they can to take that right from the people. But can they? Constitutionally? And who could even remedy it when it gets this high?

I realize this is a very convoluted area with the manipulations of the writs, but I'm just wondering if you have any thoughts on this. Thanks!

6:37 AM

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